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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906

No. 190

THOMAS R. MARTIN, PLAINTIFF-IN-ERROR,

vs.

DISTRICT OF COLUMBIA

BRIEF FOR THE DEFENDANT

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STATEMENT OF THE CASE.

This is the second of two cases, chronologically considered, brought to set aside certain assessments made against lots 42 and 43, square 69, for the opening of a minor street known as "Newport Place," under the acts of July 22, 1892, and an amendment thereto of August 24, 1894. The first of these cases is that of Brandenburg *vs.* District of Columbia, immediately following the present case upon the calendar of this court.

These cases were argued together in the courts below and resulted in favor of the defendant.

The case at bar is based upon the same facts, under the same law, as the Brandenburg case, above referred to. In this case the plaintiff is the mortgagee, supposedly, and in the Brandenburg case the plaintiff is the owner of the property against which the assessments were levied. The appellant here, the mortgagee, claims that the proceedings are void because he was not given notice and brought into the proceedings resulting in the assessments which are the subject of attack in the Brandenburg case.

The first section of the act in question (*27* stat. *255*) is as follows:

"*Be it enacted, etc.* That the Commissioners of the District of Columbia be, and they are hereby, authorized to condemn, open, extend, widen, or straighten alleys in the District of Columbia upon the presentation to them of the plat of the alley to be condemned, opened, widened, extended, or straightened, accompanied by a petition of the owners of more than one-half of the real estate in the square in which such alley is sought to be opened, widened, extended, or straightened, or when the Commissioners of the District of Columbia shall certify that the preservation of peace, good order, and public morals require any such alley shall be opened, extended, widened, or straightened, or when the Health Officer of said District shall certify that such opening, extension, widening, or straightening of an alley is necessary for the public health; provided, that in the opening, extension, widening or straightening of an alley, the fee of which is in the United States which may thereby become useless or unnecessary; and its hall also, in like manner, be lawful to close any other alleys or parts of alleys the title thereto to revert to the person or persons who dedicated the same for alley purposes, or their assigns."

Section 6 of the same act provides for notice to "each proprietor of land in the square designated."

The act of August 24, 1894, (28 stats. 501) amending the act of July *22*, 1892, authorizes the Commissioners

"To open minor streets in said district of a width of not less than forty feet, nor more than sixty feet, to run through a square from one street to another, whenever in the judgment of said Commissioners the public interest shall require it."

ARGUMENT:

The only question in this case, argued below, was whether the proceedings being valid as against Brandenburg, the owner, were void as against the mortgagee, the appellee here, because of want of notice to him and failure to bring him into the proceedings.

It will be noticed that the statute provides for notice "to each proprietor of land in the square designated." There is no provision for notice to any other person or persons, and if such notice be required it must be by virtue of some well established rule of law which obtains in actions brought by the sovereign authority in the exercise of its right of eminent domain.

No such well established rule is to be found among the authorities.

Lewis, on Eminent Domain, says, Section 324:

"On the question whether mortgagees are necessary parties to condemnation proceeding, the authorities are not only conflicting but very unsatisfactory. The cases go almost entirely upon the language of the statutes as though it was a matter entirely within the control of the legislature. It seems to us that a mortgagee stands upon higher ground, that his interest in the land and the rights secured to him by his mortgage are property which cannot be taken from him without notice and an opportunity to be heard. Where a right of way is taken through a farm it may be a matter of slight consequence. But, when an entire tract is taken which is mortgaged for all it is worth, and the compensation handed over to an insolvent mortgager, it becomes a very serious matter. This looks very much like depriving a man of his property without compensation and without due

process of law. In our opinion a mortgagee is entitled to notice as a matter of right, and, if not made a party, his rights will remain unaffected."

* * * * *

"Those courts which hold that a mortgage is divested without making the mortgagee a party also hold that the mortgage lien in equity follows the fund which is a substitute for the land and that the mortgagee may have it applied upon the mortgage debt, even though the debt is not due. * * * A statute which requires that all persons having an interest in lands to be made parties, has been held to include mortgagees even in States which hold that the mortgagees are not entitled to notice as owners."

The cases *pro* and *con* are collected in the notes to the above citation.

The learned writer admits that the cases follow the language of the statutes in the various States, although he himself is of the opinion that this should not be done. It is interesting to note, however, that none of the reasons assigned by the author for a doctrine contrary to the weight of authority, applies in the present case; and this would seem to be, *prima facie* a rather significant test of the soundness of the author's views, at least so far as they are concerned herewith.

First,—All of the tract has not been taken, but only a small part thereof. The bulk of the tract remains intact as security for the money loaned; and, in the opinion of the jury called in this case, the remainder of the tract has been greatly enhanced in value.

Second,—No compensation has been paid to the owner. On the contrary, the jury has found that the benefits accruing to the property by the opening of this minor street exceed the damage caused by taking a part of the land, and, therefore, assessments are laid to make up for this difference.

Third,—There is no allegation that the mortgagor is insolvent. If any presumptions are to be indulged, the Court will presume that the mortgagor is able to meet the debt which he has contracted.

As to the question of notice, again, the better opinion seems to be that a mortgagee is not entitled to notice.

7 Am. & Eng. Enc. Pl. & Pr. 488-9, notes.

Therefore, he should not be made a party.

In the foregoing citation, a remark will be found in the notes to the effect that if the mortgagee is recorded, then the mortgagee is entitled to notice. This seems to be in conflict with what has been cited from Lewis, on Eminent Domain.

In support of this, three cases are referred to.

The first, Wilson *vs.* R. R., 67 Me. 358, was an action of trespass brought against a railroad company. The second, Anderson, *vs.* Buchanan, 20 Neb. 281, was an action to foreclose a mortgage, and the third, Gray *vs.* Case, 51 N. J. Eq. 427, was a bill in equity to establish a mortgage as a lien prior to the condemnation proceedings. All were actions against railroad companies which had instituted condemnation proceedings by virtue of the authority contained in their charters, or under authority of an act of the legislature. In none of them was there an attempt to set aside the proceedings as void for want of notice, as is attempted to be done in the present case.

As opposed to the above view there are authorities going to show that notice to a mortgagee out of possession is not necessary.

Parish *vs.* Gilmanton, 11 N. H. 293.
Schumacher *vs.* Toberman, 56 Cal. 508.
Rand *vs.* Fort Scott, 50 Kan. 114.
Chicago &c. R. R. *vs.* Bank, 52 Kan. 467.
Chicago *vs.* Sheldon, 53 Kan. 169.

In Watson *vs.* R. R., 47 N. Y. 157, it was held that a judgment creditor was not an owner of land within the meaning of a statute authorizing condemnation proceedings.

In the cases holding that mortgagees are entitled to notice it will be seen that the proceedings were between the parties after the condemnation proceedings were finished, and that there was no attempt in in any of them to disturb the right of eminent domain so exercised.

The law as it now stands, Code of Laws for the District of Columbia, sec. 1608 (Act Feb. 23, 1905), provides for notice by advertisement to "all persons having any interest in the proceedings," * * * "and in addition to such public, said court, whenever in its judgment it is practicable to do so, shall cause a copy of said notice to be served * * * upon such owners of the fee of the land *to be condemned* as may be found * * * within the District of Columbia."

This would seem to be a legislative recognition of the rule that where "persons interested" are not mentioned, they are not entitled to notice, but only the owners or proprietors.

As to whom the compensation should be paid, the courts also disagree. 10 Eng. & Am. Enc. 1192-3.

It is true that the mortgagee has his security reduced in the amount of the land mortgaged; but he has a greater security in the increased value of the land remaining. He has had his security diminished, also, by the formation of a lien prior to his. But this is a case of *damnum absque*

injuria and must always arise where the legislature assesses the damages back upon the land by the way of benefits received, and no case has been cited that makes it illegal for the legislature to do so. Moreover, the mortgagee has still his remedy against the mortgagor and it does not appear that that remedy is fruitless. Neither does it appear nor is it anywhere alleged, that the market value of the land remaining to the owner is not equal to both the liens.

The mortgagor, certainly, has no greater or superior right than the owner of the land taken. If these proceedings are quashed on behalf of the owner, then the mortgagee has nothing to complain of. If the owner fails to establish the unconstitutionality of the law, or the irregularity of the proceedings, then it is difficult to perceive what higher authority the mortgagee has to take that task on himself.

So far as the present case is concerned, the discussion of the question relating to notice to mortgagees in cases of this kind, seems to be purely academic.

It was assumed in the argument at the first trial below, there were two trials, that the plaintiff-in-error, Martin, was the mortgagee of the premises assessed at the time of the condemnation proceedings which resulted in the opening of the said minor street and the assessment of this property for benefits, and the holder of the note secured by that mortgage. There is nothing in the petition filed in this case by the plaintiff-in-error, Martin, to show what right, if any, he has in the proceedings, or had at the time they were instituted and were in progress, or by what authority, direct or indirect, he complains of any want of notice to any party or parties interested.

The petition shows, paragraph one, record page one, that the title was conveyed to Job Barnard and James S. Edwards, trustees, to secure the payment of money loaned by Florence E. Edwards, guardian. There is no allegation in any part of the petition that shows any interest in Martin,

either as principal or agent at the time the proceedings were begun or in progress. Paragraph two of the said petition shows that the said Florence E. Edwards, guardian, was at the time the said proceedings for the opening of the said minor street were had, the owner and holder of the note. The petitioner further alleges that he "is now" (the petition was filed June 1, 1904) the owner and holder of the said note. The petitioner does not disclose when he became the holder of the note, but only that it was after the condemnation proceedings in question were had.

In paragraph 12 of the petition, record page 4, (e) and (f), the plaintiff-in-error complains of want of notice to Florence E. Edwards, at that time the holder of the note.

In short, the plaintiff-in-error became the owner of this note after the proceedings were had for the opening of the said minor street and with full notice thereof. These proceedings were *in rem* and became a matter of public record. The petitioner was bound by them and bound to take notice of what had transpired in regard to the property, and cannot now be heard to complain of any want of notice to a previous holder of the note. It is insisted here, as it was below, that the plaintiff-in-error has no standing to attack the proceedings involved in the assessment of the land upon which his note is secured.

The Court of Appeals took this view of the controversy and this was its principal reason for its opinion adverse to the plaintiff-in-error. Record, page 9. The Court also decided the question of notice adversely to the petitioner. It is the opinion of counsel, however, that argument and decision upon the question of notice were both unnecessary.

Respectfully submitted,

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